as does the original Hatch-Leahy bill and the Hatch-Leahy substitute circulated to the Judiciary Committee.

First, the new Hatch proposal outlaws precisely the thing that Justice Kennedy and at least 5 other members of the Supreme Court said could not be banned—wholly computer generated child pornography where no real children are involved in the making of the material. The Hatch proposal, in section 5, adds a totally new definition of ''child pornography'' that covers nonobscene ''computer generated images'' not at all related to any real person, if they are ''virtually indistinguishable'' from an actual minor. That is the same approach as the House bill, that we heard so roundly criticized both at our Committee hearing and by other experts. At best, it addresses the concerns of only Justice O'Connor—but she was not the deciding vote in the Free Speech case.

Second, this new definition is particularly problematic because the bill does not allow any affirmative defense for defendants who can show that no children at all were used in the making of the non-obscene image. Thus, even a defendant who can produce an actual 25-year-old in court to prove that the material is not child pornography can be sent to jail under this new provision. So too can the person who can prove in court that the image did not involve real people at all, but only totally computer generated images. Again, that is precisely the problem that Justice Kennedy and even Justice Thomas expressed concern about in the Free Speech case in considering the affirmative defense in the CPPA.

Third, the new Hatch proposal significantly changes the definition of the new crime of ''pandering'' from the original version of S. 2520 that Senator HATCH and I introduced. First, it removes the link to the long-standing obscenity test despite the fact that constitutional experts tell us that this link is necessary for the pandering crime to be constitutional. This changed definition does not address Justice Kennedy's concern that child pornography should be linked to obscenity. We do not want a situation where people who present such movies as Traffic, American Beauty, and Romeo and Juliet could be subjected to criminal prosecution, and this new pandering crime does that.

Second, the new provision compounds the constitutional problems by extending the provision to ''purported material'' in addition to actual material. Thus, not only need the pandering not relate to ''obscene'' material, it need not relate to any material at all.

From a provision that criminalized primarily commercial speech relating to obscene material, the new proposal has changed to criminalize pure ''chat,'' including over the Internet, about non-obscene child pornography. That is protected speech. I have a letter from Professor Fred Schauer, a nationally recognized First Amendment scholar who testified at our hearing, that I will place in the record that confirms that this change would render the provision pandering unconstitutional.

These are only some of the problems with the new Hatch language. I am disappointed that we could not work together to clear the prior substitute that I have been trying to clear through the Senate for almost a week. That proposal was virtually identical to the proposed Hatch-Leahy committee substitute, and was approved by every single Democratic Senator. If my colleagues would have been willing to do that, we would have had quick action on a law that would stick. Instead, we are being asked to consider a brand new version of S. 2520 with considerable constitutional problems. That is not the way to pass legislation quickly in the Senate.

Unlike Senator HATCH's prior proposals that I cosponsored, this provision will only offer the illusion of action. We need a law with teeth, not one with false teeth. In the end, this provision will be struck down just as was the 1996 CPPA and we will have wasted 6 more years without providing prosecutors the tools they need to fight child pornography and put in jeopardy any convictions obtained under a law that in the end is struck down as unconstitutional. I had hoped that we could work together to get a law that will clearly pass constitutional muster. This issue is too important for politics.

I ask that a letter from Frederick Schauer, Frank Stanton Professor of the First Amendment, be printed in the RECORD.

The material follows:

There being no objection, the material was ordered to be printed in the RECORD, as follows:

HARVARD UNIVERSITY,
*Cambridge, MA, October 3, 2002.*

Re S. 2520.

Hon. PATRICK LEAHY,
*U.S. Senate, Committee on the Judiciary, Washington, DC.*

DEAR SENATOR LEAHY: Following up on my written statement and on my oral testimony before the Committee on Wednesday, October 2, 2002, the staff of the committee has asked me to comment on the constitutional implications of changing the current version of S. 2520 to change the word ''material'' in Section 2 of the bill (page 2, lines 17 and 19) to ''purported material.''

In my opinion the change would push well over the constitutional edge a provision that is now right up against that edge, but probably barely on the constitutional side it.

As I explained in my statement and orally, the Supreme Court has from the Ginzburg decision in 1966 to the Hamling decision in 1973 to the Free Speech Coalition decision in 2002 consistently refused to accept that ''pandering'' may be an independent offense, as opposed to being evidence of the offense of obscenity (and, by implication, child pornography). The basic premise of the pandering prohibition S. 2520 is thus in some tension with more than thirty-five years of Supreme Court doctrine. What may save the provision, however, is the fact that pandering may also be seen as commercial advertisement, and the commercial advertisement of an unlawful product or service is not protected by the Supreme Court's commercial speech doctrine, as the Court made clear in both Virginia Pharmacy and also in *Pittsburgh Press* v. *Human Relations Commission*, 413 U.S. 376 (1973). It is important to recognize, however, that this feature of commercial speech doctrine does not apply to noncommercial speech, where the description or advocacy of illegal acts is fully protected unless under the narrow circumstances, not applicable here, of immediate incitement.

The implication of this is that moving away from communication that could be described as an actual commercial advertisement decreases the availability of this approach to defending Section 2 of S. 2520. Although it may appear as if advertising ''material'' that does not exist at all (''purported material'') makes little difference, there is a substantial risk that the change moves the entire section away from the straight commercial speech category into more general description, conversation, and perhaps even advocacy. Because the existing arguments for the constitutionality of this provision are already difficult ones after Free Speech Coalition, anything that makes this provision less like a straight offer to engage in a commercial transaction increases the degree of constitutional jeopardy. By including ''purported'' in the relevant section, the pandering locks less commercial, and thus less like commercial speech, and thus less open to the constitutional defense I outlines in my written statement and oral testimony.

I hope that this is helpful.

Yours sincerely,

FREDERICK SCHAUER,
*Frank Stanton Professor of the First Amendment.*●

## VETERANS LONG-TERM CARE AND MEDICAL PROGRAMS ENHANCEMENT ACT OF 2002

● Mr. ROCKEFELLER. Mr. President, I am sincerely disappointed about the placing of an anonymous hold on S. 2043, the ''Veterans Long-Term Care and Medical Programs Enhancement Act of 2002.''

There is no apparent reason why this important piece of legislation should be held up at this time. It was developed in a bipartisan manner and encompasses many vital pieces of legislation from both sides of the aisle. It is my sincere hope that the Senator responsible for this hold will realize that this is certainly not the time to be playing politics with legislation that affects our Nation's veterans.

I would like to share with my colleagues some of the key provisions of S. 2043 that seek to improve the accessibility and quality of the VA health care system.

The centerpiece of this bill is an effort to make VA's prescription drug copayment policy a bit more equitable for lower-income veterans. Mr. President, currently, veterans with incomes of less than $24,000 a year are exempt from copayments for most VA health care services. However, when it comes to prescription drugs, the income threshold for exemption is about $9,000 a year. This bill would raise the exemption level for prescription copayments to make them the same as other VA health care copayments.

Veterans earning just over $9,000—which is well below the poverty threshold, are required to make prescription copayments. These copayments place an enormous financial burden on our poorest veterans. To compound this problem, earlier this year, the Department of Veterans Affairs increased the copayment for prescription drugs from $2 to $7 per 30-day prescription.

Most of the veterans who will benefit from this provision are older, are on fixed incomes, and are on many different medications, each requiring a separate copayment. Most of them have no health insurance except for Medicare and so they must depend upon the VA for their medications. With the lack of a Medicare drug benefit, these veterans are now faced with a 350 percent increase in what they must pay for life-sustaining medications.

Imagine the situation of a veteran with an income of about $10,000 a year who takes ten medications a month and it is not at all unusual for an elderly person to take that many medications. With the increase in the prescription copayment rate, that veteran now has to allocate over 8 percent of this annual income just to pay for prescription drugs. And although the $7 per prescription charge may seem like an insignificant amount to some, I can assure my colleagues that to the veteran and his family living on a very limited income, it is quite significant.

Of particular note, S. 2043 also contains mental health care provisions—a key element of caring for those who have served on the battlefield—that would ensure currently successful programs across the country continue to get necessity funding. Congress previously enacted a provision to designate $15 million in VA funding specifically to help medical facilities improve care for veterans with substance abuse disorders and PTSD. The funds for these mental health grant programs, mandated by the Veterans Millennium Benefits and Health Care Act of 1999, will soon revert to a general fund.

Despite the slow start, this funding has already increased the PTSD and substance abuse disorder treatment programs available to veterans. More than 100 staff have been hired in 18 of VA's 21 service networks to treat substance abuse disorders. Nine new programs—in Baltimore, Maryland; Atlanta, Georgia; San Francisco, California; and Dayton, Ohio among others—have initiated or intensified opioid substitution programs for veterans who have not responded well to drug-free treatment regimens. Other new programs, such as those in Tampa, FL; Cincinnati, OH; Columbia, MO; and Loma Linda, CA put special emphasis on treating veterans with more complex conditions that include PTSD and substance abuse. The additional funding has enabled VA to develop better outpatient substance abuse and PTSD treatment programs, outpatient dual-diagnosis programs, more PTSD community clinical teams, and more residential substance abuse disorder rehabilitation programs. The legislation being blocked in the Senate would ensure that this funding remained ''protected'' for three more years, and would increase the total amount of funding identified specifically for treatment of substance abuse disorders and PTSD from $15 million to $25 million.

Additionally, the bill contains authorization for four construction projects. Two of these projects are much-needed seismic corrections for VA Medical Centers in the state of California. I think all of my colleagues would agree that no veteran should ever be endangered by aging infrastructure while in the care of VA should a natural disaster, such as an earthquake, occur. I thank Senator BOXER for her leadership on the construction issue. The remaining two construction projects in S. 2043 are for nursing homes. One of these homes is in Beckley, WV, of which the design plans have already been made. I am proud to be involved in helping to bring a long-term care facility to the veterans of my home State who have been in need of such a home for quite some time now. The other nursing home project is in Lebanon, PA.

S. 2043 would also fix a longstanding problem faced by VA's retired nurses. Last December, Congress passed the Department of Veterans Affairs Health Care Programs Enhancement Act of 2001. Enacted as Public Law 107–135, this legislation gave VA several tools to respond to the looming nurse crisis. In addition, it altered how part-time service performed by certain title 38 employees would be considered when granting retirement credit.

Previously, the law required that title 38 employees' part-time services prior to April 7, 1986, be prorated when calculating retirement annuities, resulting in lower annuities for these employees. Section 132 of the VA Health Programs Enhancement Act was intended to exempt all previously retired registered nurses, physician assistants, and expanded-function dental auxiliaries from this requirement. However, the Office of Personnel Management has interpreted this provision to only apply to those health care professionals who retire after its enactment date.

The legislation being blocked in the Senate would require OPM to comply with the original intent of the VA Health Programs Enhancement Act, and therefore to recalculate the annuities for these retired health care professionals. This clarification would not extend retirement benefits retroactively to the date of retirement, but would ensure that annuities are calculated fairly from now on for eligible employees who retired between April 7, 1986, and January 23, 2002.

Mr. President, the legislation would also provide transfer rights for hourly rate Veterans Canteen Service, VCS, employees to title 5 VA positions through internal competitive procedures. VCS hourly employees are federal employees hired under the authority of 38 U.S.C. 7802. While this authority provides many of the same benefits that title 5 federal employees enjoy, (i.e., workers compensation, health benefits, retirement, and veterans preference) there are benefits to which they are not entitled. For example, VCS hourly employees do not have the same transfer rights to other VA positions that VCS managers have.

As a result, VCS hourly employees applying for VA food service positions, VA housekeeping positions, and other VA positions—positions for which they are well qualified—are not treated as internal competitive service candidates. Their years of service are irrelevant, as they cannot easily transfer to another job at VA without first going through civil service competitions. This legislation would change that and allow them to compete equally with other VA candidates. I wish to thank the American Federation of Government Employees for bringing this issue to my attention and for the assistance and leadership that they provided.

S. 2043 will help thousands of veterans across America, in a variety of ways. We cannot turn our backs on those who have sacrificed so much for this country. I strongly urge my colleagues to support this legislation.●

## MESSAGES FROM THE HOUSE

### ENROLLED BILLS SIGNED

Under the authority of the order of the Senate of January 3, 2001, the Secretary of the Senate, on October 23, 2002, during the recess of the Senate, received a message from the House of Representatives announcing that the Speaker has signed the following enrolled bills:

S. 1210. An act to reauthorize the Native American Housing Assistance and Self-Determination Act of 1996.

S. 1227. An act to authorize the Secretary of the Interior to conduct a study of the suitability and feasibility of establishing the Niagara Falls National Heritage Area in the State of New York, and for other purposes.

S. 1270. An act to designate the United States courthouse to be constructed at 8th Avenue and Mill Street in Eugene, Oregon, as the ''Wayne Lyman Morse United States Courthouse.''

S. 1533. An act to amend the Public Health Service Act to reauthorize and strengthen the health centers program and the National Health Service Corps, and to establish the Healthy Communities Access Program, which will help coordinate services for the uninsured and underinsured, and for other purposes.

S. 1646. An act to identify certain routes in the States of Texas, Oklahoma, Colorado, and New Mexico as part of the Ports-to-Plains Corridor, a high priority corridor on the National Highway System.

S. 2690. An act to reaffirm the references to one Nation under God in the Pledge of Allegiance.